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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PRESENT TERM 1983

GERALD LEN VOGEL,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether there was probable cause for the search of an automobile behind which Petitioner was standing at the time of his arrest, which was shortly before the search in question. Petitioner contends that there was no probable cause for a search by police officers of the vehicle and its contents. Petitioner further contends that even if such probable cause existed, there were not sufficient exigent circumstances present to allow a warrantless search of such vehicle.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

This petition asks this Honorable Court to review the judgment of the Supreme Court of Alabama, affirming the Court of Criminal Appeals of Alabama, in a case styled Ex Parte: Gerald Len Vogel, Petition For Writ Of Certiorari to the Court of Criminal Appeals (Re: Gerald

Len Vogel, Appellant, vs. State of Alabama, Appellee), and the judgment and opinion of the Alabama Court of Criminal Appeals in Vogel vs. Alabama, reported 415 So.2d 1210. The Alabama Court of Criminal Appeals affirmed, with an opinion, the judgment of the Circuit Court of Montgomery County, Alabama on October 28, 1980, and the Alabama Supreme Court reversed with an opinion, on September 18, 1981. Subsequently, the Supreme Court of Alabama granted rehearing on application of the State of Alabama, and, by order dated July 23, 1982, affirmed the decision of the Court of Criminal Appeals. Petitioner was not advised by the Supreme Court of Alabama of such order until on or about March 3, 1983.

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LIST OF PARTIES

The only parties to the proceeding in the courts below were Gerald Len Vogel and the State of Alabama.

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TABLE OF AUTHORITIES

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REFERENCE TO REPORTS OF OPINIONS OF COURTS BELOW

The final decision of the Supreme Court of Alabama in this case was rendered on July 23, 1982, but was not furnished to Petitioner until on or about March 3, 1983. Its decision has not yet been reported. The decision of the Court of Criminal Appeals of Alabama was rendered October 28, 1980 and has not yet been reported. Copies of the opinions and orders of the Supreme Court of Alabama and the Court of Criminal Appeals of Alabama are included as an Appendix to this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The Court of Criminal Appeals of Alabama rendered its decision on October

28, 1980. Application for Rehearing was timely filed and was denied on November 25, 1980. A petition for writ of certiorari was timely filed in the Supreme Court of Alabama and was granted by order dated July 23, 1982, which order also affirmed the ruling of the Court of Criminal Appeals.

Jurisdiction of this case is conferred upon the Supreme Court of the United States by 28 U.S.C.S. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by

oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On May 30, 1979, two Montgomery Police Officers, Lindsey and Pilgreen, were on routine patrol when they saw an automobile parked (facing them) on a rural road near the outskirts of the City of Montgomery. The Officers had not received information of any recent burglary and did not use their radio to inquire as to any recent major crime.

As Lindsey and Pilgreen approached the parked vehicle, they saw Petitioner and his brother, Robert Louis Vogel, standing behind the parked car at its trunk, which was opened. Officer Lindsey testified that, as they approached the parked car, he saw "a subject throw a plastic bag down on the ground." Officer

Pilgreen testified that he had an unobstructed view of both sides of the parked car and that he saw nothing thrown on the ground.

Officers Lindsey and Pilgreen observed three army type duffel bags in the back seat of the car. The bags were closed. At the hearing on Petitioner's Motion to Suppress Evidence and to Quash a Search Warrant, Officer Lindsey testified that the outside appearance of the duffel bags indicated that they might contain marijuana bricks. However, although Lindsey testified that he would not call for a property crime investigator in a case involving marijuana, Lindsey did in fact instruct his partner, Pilgreen, to get on the radio and call headquarters for the purpose of having a property crime investigator sent to the scene.

Within twenty minutes after the officers made their initial contact with Petitioner, Property Investigator Jim Nichols arrived on the scene. After he and Officer Lindsey had discussed the situation, Nichols requested permission to look in the trunk of the car. Permission was refused, whereupon additional investigation was conducted by Officer Lindsey and it was decided by the Officers to arrest Petitioner for the offense of littering.

Officer Lindsey admitted that he did not decide to arrest Petitioner for littering when he saw the plastic bag thrown to the ground. Investigator Nichols admitted that the arrest for littering was merely a device to provide an excuse for searching the trunk of the automobile.

The Officers never had any basis

for forming a conclusion with reasonable certainty as to what might be contained in the duffel bags. Lindsey and Nichols discussed the possibility that the duffel bags probably contained either stolen property or marijuana bricks, but there is no evidence that they ever reached any conclusion beyond their speculation. The Officers merely suspected that "some kind of contraband" may be in the car.

When Officer Nichols attempted to look in the trunk of the car pursuant to the littering arrest, Petitioner's brother, Robert Vogel, attempted to stop them from doing so. the Officers were unable to get into the trunk of the car so they then went inside the car and opened the duffel bags, where they found drugs.

Although an attempt was made by the State's witnesses to indicate that

Petitioner Gerald Vogel was not under arrest when the above-described events were taking place (and thus presumably could have taken the automobile and left in it), the testimony of the Officers clearly indicates the Petitioner was under restraint. In fact, he was in handcuffs. Furthermore, the Officers had possession of the keys to the car.

On questioning by the trial judge, Officer Lindsey admitted that he "just suspected" that there might be marijuana in the duffel bags.

Based upon the discovery of drugs inside the duffel bags, the police obtained a search warrant for the automobile. Allegedly acting pursuant to this search warrant, the trunk of the automobile was opened, revealing additional drugs.

It was admitted that the officers

were not looking in the Appellants' automobile for weapons.

Petitioners were indicted by the Montgomery County Grand Jury on June 8, 1979. He pleaded not guilty and filed a Motion to Suppress Evidence and a Motion to Quash Search Warrant.

A hearing was held July 24, 1979, before the trial judge on the Motion to Suppress Evidence and the Motion to Quash Search Warrant. These motions were denied by the trial court.

After the hearing on the above described motions, the case was tried by the court without a jury. Petitioner waived jury trial.

After the non-jury trial, the trial court found Petitioner guilty.

Petitioner gave Notice of Appeal to the Court of Criminal Appeals of Alabama.

On October 28, 1980, the Court of

Criminal Appeals of Alabama reversed Petitioner's conviction for an error in sentencing but held that the search which led to Petitioner's arrest was proper. Application For Rehearing was timely filed and was denied.

A Petition For Writ of Certiorari was filed in the Supreme Court of Alabama, which on September 18, 1981 an opinion reversing the Court of Criminal Appeals on the search question. Subsequently, on applications for rehearing by both parties, the Supreme Court of Alabama withdrew its earlier opinion and held that the search in this case was proper.

FEDERAL QUESTIONS RAISED BELOW

The federal question sought to be reviewed were raised by a Motion To Suppress Evidence and a Motion To Quash Search Warrant filed in the Circuit Court

of Montgomery County on June 22, 1979. Copies of said Motions are set out in the appendix. An evidentiary hearing was held by the trial court on July 24, 1979. At the conclusion of the evidentiary hearing oral arguments were presented to the trial judge, at which cases decided by the Alabama Appellate Courts and by the Supreme Court of the United States were presented in support of Petitioner's position. The trial judge denied said motion.

The same federal question was presented on appeal to the Court of Criminal Appeals of Alabama. The issues here presented were presented in Petitioner's brief to said Court. A copy of Petitioner's Statement of the Issues in said brief is included in the Appendix. The Court of Criminal Appeals rejected Petitioner's argument, as

reflected in its opinion.

The same federal questions were presented to the Supreme Court of Alabama by petition for writ of certiorari. In Petitioner's brief in support of such petition, a Statement of the Issues was included which was identical to that reproduced in of the appendix. The Supreme Court of Alabama also rejected Petitioner's arguments.

ARGUMENT

In United States v. Beck(5th Cir. 1979) 602 F.2d 726, the Fifth Circuit Court of Appeals dealt with a case where law enforcement officers, passing through a predominantly black, high-crime neighborhood, noticed a Chevrolet automobile containing two black males parked on the left side of the road with its engine running. One of the officers knew most of the people in the

neighborhood and testified that these two men were strangers. A store which was subject to robbery or to burglary was located nearby. When the officers approached the occupants of the Chevrolet, they were extremely nervous and engaged in furtive movements, as if something was being passed between them. The Fifth Circuit held that the conduct of the officers constituted a stop of the defendants' vehicle (the same sort of stop that is present in the instant case) and said:

> "in our view the police action here, viewed in the totality of the circumstances, did constitute such a stop. Hence, it was lawfully only if based upon a reasonable suspicion that some criminal activity was afoot. Brown v. Texas, -----U.S. at -----, 99 S. Ct. at 2641. In this case, no such suspicion was present."

The Court went on to observe:

"Spears's mere unfounded

> feeling that something might be afoot did not warrant his stop of the Chevrolet."

In United States v. Frisbie (5th Cir. 1977) 550 F.2d 335, the defendant was arrested during the early morning hours on a highway which was frequently used by persons seeking to bring illegal aliens into the United States from Mexico. His vehicle appeared to be heavily loaded. He did not have a key to the camper on the back of the vehicle. He appeared to be extremely nervous. Twenty-Nine Hundred pounds of marijuana were found in the vehicle. The Fifth Circuit observed:

> "Tested by objective standards, see e.g., Dodd v. Beto, 5 Cir., 1970, 435 F.2d 868, 870 the movements of this van did not give rise to a reasonable belief that criminal activity was afoot. Driving a loaded van with out-of-state plates in the early morning hours, heading west from Fabens toward El Paso, does not create a reasonable inference

of criminal activity. The situation is not, moreover, turned into a basis for probable cause merely because there was a high incidence of smuggling in the area *** It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and silent deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

In Barnett v. United States, (5 Cir. 1967) 384 F.2d 848, the Court observed:

"Deputy Fisher testified with laudatory candor that he had no specific idea of what he was

> looking for and that he would have been unable to list the items sought with sufficient specificity to secure a warrant for the search. The search was a general exploratory one made for evidence of a charge as to which the officers had, at the most, mere suspicion."

One simple question seems to be a valid test of whether or not proable cause exists. It is: Could the officer, in applying for a search warrant, have told the magistrate what he expected to find in the area to be searched? If he can, probable cause may exist. If he cannot, probable cause definitely does not exist.

Here, had Officers Lindsey, Pilgreen, and Nichols been applying for a search warrant, they could not have told the issuing magistrate what they were looking for. They just "suspected." They suspected that "some kind of (unidentified) contraband" might be in

the vehicle. They discussed between themselves the possibility that the duffel bags within the car contained either stolen property or marijuana bricks, but they never reached any probable cause conclusion as to which, if either, of those illicit substances might be contained therein.

Under these circumstances, there was no probable cause to search the vehicle by which Appellants were found.

The State of Alabama has argued before the Appellate Courts of Alabama that this case is controlled by Chambers v. Maroney, 399 U.S. 42, ____ S.Ct. ____ _____ L.Ed.2d ____. We submit, however, that there is one important element of probable cause which was present in Chambers and not present here - in Chambers, the police had been alerted that a robbery had just been committed by

a perpetrator wearing a green sweater and occupying a blue compact station wagon. Thus, they knew what to look for. In this case, with no report of a crime, the police just saw two men standing behind a vehicle on a public road.

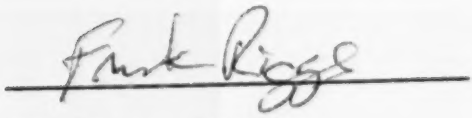
In United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623, this Court observed, at 45 L.Ed.2d 629:

> "This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. Almeida-Sanchez, 413 U.S. at 269-270, 37 L.Ed.2d 596, 93 S.Ct. 2535; Chambers v. Maroney, 399 U.S. 42, 51, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970).

CONCLUSION

For the reasons stated above, Petitioner prays that the writ applied for be granted.

Respectfully submitted,



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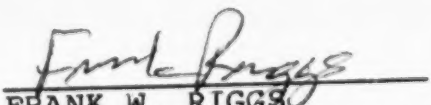
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition upon Honorable Charrles Graddick, Attorney General, State of Alabama, 250 Administration Building, Montgomery, Alabama 36104, by mailing a copy of same to him, postage prepaid, this ____ day of April, 1983.



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